

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

MARCOS A. TOYENS,  
Appellant,

v.

DEPARTMENT OF JUSTICE,  
Agency.

DOCKET NUMBER  
NY315H920525-I-1

DATE: SEP 02 1993

Bernabe Rosa-Concepcion, Fort Buchanan, Puerto Rico, for  
the appellant.

Maxine G. Sharpe, Esquire, Washington, D.C., for the  
agency.

BEFORE

Ben L. Erdreich, Chairman  
Jessica J. Parks, Vice Chairman  
Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review of the November 27, 1992 initial decision that affirmed his probationary termination. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, however, to further consider the appellant's claim that he had completed his probationary

period prior to the agency's action, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still sustaining the agency's action.

#### BACKGROUND

The appellant was appointed to the GS-6 position of Correctional Officer effective July 14, 1991, subject to the completion of a 1-year probationary period. Initial Appeal File (IAF), Tab 3, Subtab T. On July 8, 1992, the agency proposed the appellant's termination based on a charge of falsification and omission of information during his preemployment interview. *Id.*, Subtab J. After providing him an opportunity to respond, which he exercised both orally and in writing, *id.*, Subtabs H, I, the agency issued a decision notice terminating the appellant effective at noon, on July 13, 1992. *Id.*, Subtab G.

On petition for appeal, the administrative judge afforded the appellant a hearing and found that, because the appellant was terminated for preappointment reasons and because he made a nonfrivolous allegation that the agency failed to comply with the procedural requirements of 5 C.F.R. § 315.805, the Board had jurisdiction over the appeal. IAF, Tab 11, Initial Decision (ID) at 1-2. The administrative judge also found, however, that the appellant was terminated during his probationary period and that the agency did not violate his procedural rights in taking the action. ID at 2-4. The administrative judge further found that, because the appellant presented no evidence to support his allegation of national

origin discrimination, he had failed to prove the claim. ID at 4-5. She therefore sustained the appellant's removal.

In his petition for review, the appellant, inter alia, repeats his argument that his probationary period ended before his termination became effective. He also asserts that the administrative judge erred by not ruling on the validity of a second SF-50 presented by the agency at the hearing that documents his termination during his probationary period.<sup>1</sup> Petition for Review File (PFRF), Tab 1, Petition for Review (PFR) at 2-5, 11. The agency has timely responded in opposition to the petition. PFRF, Tab 3.

#### ANALYSIS

Separations from Federal employment are generally effective at midnight of the effective date unless another time is specified. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 679 (1991); *Jeffery v. Department of the Treasury*, 3 M.S.P.R. 402, 404-05 (1980); Federal Personnel Manual (FPM), ch. 315, subch. 8-6(a) (June 9, 1992). Probationary periods cease at the end of an employee's tour of duty on the last day before the anniversary date. *Stephen*, 47

---

<sup>1</sup> With his petition, the appellant submits for the first time a number of documents addressing the length of time provided to another probationary employee to respond to a termination proposal notice. Petition for Review File, Tab 1. We have not considered these documents because the appellant has not shown that, despite his due diligence, these documents were unavailable prior to the close of the record below. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

M.S.P.R. at 679; *Jeffery*, 3 M.S.P.R. at 404; FPM, ch. 315, subch. 8-6(a).

The appellant argues, *inter alia*, that the SF-50 documenting his termination that the agency originally provided to him did not state effective time of the action, but only stated that it was effective on July 13, 1992. PFR at 2; see IAF, Tab 7, Exhibit B. He asserts that, because no other time was specified, the action was effective at midnight on July 13, 1992, and, because his tour of duty ended at 2 p.m. on that day, he was not terminated during his probationary period. PFR at 2. The appellant maintains that the agency subsequently issued a second SF-50 documenting that his termination was effective at noon on July 13, 1992.<sup>2</sup> PFR at 2-3; see IAF, Tab 3, Subtab F. He argues that the agency retroactively changed the effective time of the action and that the agency committed procedural errors in its processing of the second SF-50. PFR at 2-5. The administrative judge did not address these allegations, although the appellant raised them below. See IAF, Tabs 7, 10. This was error. See, e.g., *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). Thus, we address these allegations now.

The Board has held that, although the issuance of an SF-50 is the customary documentation for a personnel action, it

---

<sup>2</sup> The appellant asserts that the agency submitted this document for the first time at the hearing. PFR at 2-4. Contrary to the appellant's assertion, the document was submitted with the agency's file. IAF Tab 3, Subtab F.

does not effect the personnel action. *Vandewall v. Department of Transportation*, 52 M.S.P.R. 150, 155 (1991); *Scott v. Department of the Navy*, 8 M.S.P.R. 282, 287 (1981). Rather, the decision notice approved by an individual with the proper authority effects the personnel action. See *Vandewall*, 52 M.S.P.R. at 155; *Scott*, 8 M.S.P.R. at 287.

In this appeal, the decision notice, issued by the Warden of the agency's correctional facility at which the appellant was employed, stated that the action was effective at noon on July 13, 1992. IAF, Tab 3, Subtab G. The appellant has not challenged the authority of the agency's Warden to approve the termination action, and our review of the record shows that he had such authority. See *Vandewall*, 52 M.S.P.R. at 155; *Scott*, 8 M.S.P.R. at 287; IAF, Tab 3, Subtabs A, G, H-J, Tab 6 at 3. Further, the appellant acknowledged below that his tour of duty ended at 2 p.m. on July 13, 1992. IAF, Tab 7 at 2. Therefore, regardless of the omission from the original SF-50 of the time of day that the termination was effective, we find that the appellant was terminated pursuant to the decision notice before the completion of his tour of duty on the last day before the anniversary date of the end of his probationary period.<sup>3</sup> See *Stephen*, 47 M.S.P.R. at 679; *Jeffery*, 3 M.S.P.R. at 404-05.

---

<sup>3</sup> Because of our finding that the July 13, 1992 decision notice effected appellant's termination during his probationary period, the appellant's claims of procedural errors in the processing of the second SF-50 are irrelevant.

Accordingly, the administrative judge properly sustained the agency's action.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission  
Office of Federal Operations  
P. O. Box 19848  
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after

receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.